

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMEEL ALSAIDI	:	DETERMINATION
D/B/A HOLLYWOOD GROCERY STORE	:	
DTA NO. 811867	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1987	:	
through February 28, 1991.	:	

Petitioner, Jameel Alsaidi d/b/a Hollywood Grocery Store, 120 East Burnside Avenue, Bronx, New York 10453-4138, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through February 28, 1991.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 14, 1994 at 9:15 A.M. and was continued to conclusion on April 8, 1994 at 9:15 A.M. Petitioner filed a brief on June 20, 1994. The Division of Taxation filed a brief on July 8, 1994. Petitioner was granted until August 4, 1994 to file a reply brief, but did not do so. Petitioner appeared by Edmund J. Mendrala, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel).

ISSUE

Whether petitioner has proven error in the Division of Taxation's audit method or result where such method consisted of a one-day observation of petitioner's sales.

FINDINGS OF FACT

On March 12, 1992, following an audit, the Division of Taxation ("Division") issued to petitioner, Jameel Alsaidi d/b/a Hollywood Grocery Store, a Notice of Determination which assessed \$29,042.48 in additional sales tax due, plus penalty and interest, for the period

December 1, 1987 through February 28, 1991.

During the period at issue, petitioner owned, as a sole proprietor, a small store known as Hollywood Grocery Store. Petitioner's store sold groceries, beer, soda and cigarettes. Hollywood Grocery Store was located on East Burnside Avenue in the Bronx, a commercial area beset with crime. The hours of operation of petitioner's store were from 6:00 A.M. to midnight and the store was open seven days a week. A grocery store similar to petitioner's was located across the street. Another similar store was near the end of petitioner's block and a supermarket was located around the corner.

On audit, petitioner's accountant advised the Division that petitioner maintained no books or records for his business, nor did petitioner have a business checking account.

The Division therefore decided to use a one-day observation test to determine petitioner's taxable sales. The date of the observation test was Tuesday, May 7, 1991. The Division's auditors arrived at the store unannounced on that date and observed and recorded all sales in the store from 8:00 A.M. to 8:00 P.M. This total was determined to be the total sales of the store for the day.

The Division observed \$540.05 in total gross sales during the course of the observation test. Of this amount, \$440.54 were taxable sales. After allowing credit for bottle deposits and City cigarette tax and dividing taxable sales by 1.0825 to remove sales tax, the Division determined net daily gross sales of \$481.38 and net daily taxable sales of \$381.87 per the observation test. The Division projected this daily taxable sales amount over the period December 1, 1989 through February 28, 1991. The Division then calculated daily taxable sales figures of \$332.06 for the period December 1, 1988 through November 30, 1989 and \$288.75 for the period December 1, 1987 through November 30, 1988. The reduction in daily taxable sales for the earlier portions of the audit period were premised on the assumption that the business grew from year to year and were calculated by dividing the daily taxable sales figure for the prior period by 1.15 (i.e., $\$381.87 \div 1.15 = \332.06 and $\$332.06 \div 1.15 = \288.75).

The Division also allowed for 11 days closed during the audit period. Specifically, the Division allowed as days closed the Christmas (4) and New Year (4) holidays falling within the audit period and also 3 other days. The Division also made an allowance of 5% for pilferage, spoilage and waste.

Using the methodology described above and after an allowance for taxable sales reported, the Division calculated additional taxable sales for the audit period of \$349,969.98. Applying the prevailing rate of 8.25% to such taxable sales results in additional tax due of \$28,872.52.

The Division also determined that petitioner did not file a sales tax return for the quarter ended November 30, 1990. The Division estimated tax of \$169.95 for that quarter based on returns from prior quarters. Total additional sales tax due for the entire audit period thus amounted to \$29,042.48.

Petitioner was out of the country and was residing in Yemen from June 1989 until September 1990. During his absence, petitioner's brother ran the store. Upon his return, petitioner again ran the store.

Throughout the entire audit period, including when petitioner was overseas, sales tax returns were filed under the name "Alsaidi Jameel/Hollywood Grocery Store" using identification number 13-3433964.

Sales tax returns were prepared and filed throughout the audit period by petitioner's accountant. Petitioner indicated that the accountant prepared such returns from sales information provided by petitioner or, during petitioner's absence, petitioner's brother. Inasmuch as petitioner kept no records whatsoever of his sales, the quarterly information provided to the accountant was based on recollections and estimates.

At hearing, petitioner testified that the weather on the day of the observation test was sunny and warm and that, as a result, his business on that day increased "a little bit" (tr., p. 47).

Petitioner also presented the testimony of his cousin, Jameel Ahmed Alsaidi, who was present in the store on the day of the observation. Petitioner's cousin testified that the weather

on that day was "not bad . . . nice weather" (tr., p. 34) and that it was unusually warm.

The auditor who performed the observation test testified that he did not think the weather on the day of the test was unusually warm.

Petitioner also testified that, on the day of the observation, an ongoing construction project on Burnside Avenue had closed the sidewalk on the opposite side of the street from petitioner's store.

Petitioner's cousin, Jameel Ahmed Alsaidi, also testified that the sidewalk on the opposite side of the street from petitioner's store was closed on the day of the observation test.

The auditor testified that, while construction work was going on in the street on the day in question, the sidewalks on both sides were open for pedestrians.

Petitioner also testified that his sales on the day of the observation were "almost double [his usual sales] . . . almost \$200.00 and change extra" (tr., p. 67).

CONCLUSIONS OF LAW

A. Petitioner conceded that he failed to maintain any records of his business and further conceded that the Division was authorized to estimate his sales tax liability pursuant to Tax Law § 1138(a)(1). The parameters of such an estimate methodology are well established. The audit method selected must be "reasonably calculated to reflect the taxes due" (Club Marakesh v. Tax Commn. of the State of New York, 151 AD2d 908, 910, 542 NYS2d 881, 883, lv denied 74 NY2d 616, 550 NYS2d 276). Such method, however, need not be immune from attack as imprecise (see, Meskouris Bros. v. Chu, 139 AD2d 813, 814-815, 526 NYS2d 679, 681), for "where the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required" (Meyer v. State Tax Commn., 61 AD2d 223, 228, 402 NYS2d 74, 78, lv denied 44 NY2d 645, 406 NYS2d 1025). Where the Division resorts to such a method, the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment or the assessment itself is erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542, 543).

B. In the instant matter, the Division did a one-day observation test to determine petitioner's taxable sales for the audit period. Inasmuch as petitioner failed to maintain any sales records for the period at issue and inasmuch as there is a large body of case law upholding observation test audit methods similar to that employed herein, such audit method must be sustained (see, e.g., Lombard v. Commr. of Taxation & Fin., 197 AD2d 799, 602 NYS2d 972 [one-day observation test]; Matter of Vebol Edibles v. Tax Appeals Tribunal, 162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643 [two-day observation test]; Matter of Club Marakesh v. Tax Commn. of the State of New York, supra [one-day observation test]; Matter of Meskouris Bros. v. Chu, supra [two-day observation test]).

C. Petitioner contended that, in its estimate of tax due, the Division improperly failed to consider two factors unique to the day of the observation test. Specifically, petitioner contended that the weather on the day of the observation test was exceedingly warm and that, as a result, petitioner's sales on that day exceeded his sales on a typical day. Petitioner also contended that as a result of construction on Burnside Avenue on the day of the observation test, the sidewalk on the opposite side of the street from his store was closed to pedestrian traffic and that this circumstance resulted in an increase in pedestrian traffic on petitioner's side of the street which, in turn, resulted in increased sales.

Petitioner's contention regarding the weather is based upon his own recollection and that of his cousin who was present in the store on the day in question (see, Findings of Fact "12" and "13"). This testimony is outweighed by the absence from the record of any documentation (i.e., weather reports, newspaper articles, etc.) to corroborate petitioner's contention and the fact that petitioner did not make any comment regarding the weather to the auditor at the time of the observation test. Accordingly, petitioner has failed to prove that the weather on the day in question was exceedingly warm.

Furthermore, the testimony indicates more that the weather on the day in question was nice, not that it was unusual (see, Findings of Fact "12" and "13"). At best, therefore, even if proven, the weather would have only marginally affected petitioner's sales on the day of the

observation. Since the Division's audit method need not be precise (see, Meskouris Bros. v. Chu, supra), the Division's failure to account for the marginal affects of the weather cannot render the audit method herein invalid.

Petitioner's contention that the sidewalk on the opposite side of the street was closed is also based on the recollection of petitioner and his cousin (see, Findings of Fact "15" and "16"). Given the contradictory testimony of the auditor on this point (see, Finding of Fact "17") and the fact that petitioner did not raise this point at the time of the observation test, it is concluded that petitioner has failed to prove this contention. Moreover, as with the question of the weather, even if the sidewalk on the opposite side of the street was closed, such a fact still does not establish that petitioner's sales on the day of the observation were atypical. Indeed, given the number of grocery stores in the immediate area of petitioner's store (see, Finding of Fact "2"), the effect on petitioner's sales of closing the opposite side of the street would seem rather uncertain without additional information. In the absence of any sales records, the contention that the construction caused an increase in sales is thus speculative and cannot result in an adjustment to the assessment herein.

Finally, and most importantly, even if, contrary to the discussion above, petitioner had established that the weather was unusually warm and that the sidewalk on the opposite side of the street from petitioner's store was closed to pedestrian traffic and that these two factors had caused an increase in petitioner's sales on the day in question, there is simply no evidence in the record upon which to make an adjustment to the audit calculations.¹ Since petitioner maintained no records of his sales, there is no way to determine petitioner's actual daily sales and thus no basis upon which to modify the assessment.

Petitioner also presented testimony purporting to show that the store's sales during the period of petitioner's absence were substantially diminished by petitioner's brother's haphazard

¹In this regard, it is noted that petitioner's statement regarding the relation of sales on the day of the observation to a "typical day" (see, Finding of Fact "18") must be dismissed as unsubstantiated speculation.

management (i.e., irregular hours, failure to pay suppliers, etc.). Even if proven, in the absence of records, such mismanagement cannot be quantified and an adjustment to the assessment cannot be made.

D. Petitioner also contended that his liability should not extend to the period during which he was out of the country. Petitioner argued that during that period he had no management control over the business, made no capital contributions to the business and had no indicia of ownership whatsoever. Petitioner further contended that he gave the store to his brother prior to his departure and that there was no promise that petitioner would resume operating the store upon his return.

Petitioner's contention is rejected. As the Division correctly points out in its brief, the facts herein clearly indicate that petitioner retained ownership of his business while he was in Yemen and that his brother was merely operating the store on petitioner's behalf. Specifically, the store continued to operate under the same name and in the same location; there was

no formal sale of the business; sales tax returns continued to be filed under petitioner's name and identification number; sales tax returns continued to be prepared in the same manner by the same accountant; and petitioner did, in fact, resume operating the business upon his return.

In light of these facts, it is clear that petitioner retained ownership of his store and continued to be a vendor for sales tax purposes during the period he was out of the country. The Division's assessment of sales taxes against petitioner during the time he was in Yemen was therefore proper.

E. The petition of Jameel Alsaidi d/b/a Hollywood Grocery Store is denied and the Notice of Determination dated March 12, 1992 is sustained.

DATED: Troy, New York
January 19, 1995

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE